

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, . Civil No. 09-00175-SJF-1
Vs. .
100 Federal Plaza
Central Islip, NY
FERNANDO PABON, .
et al., .
APRIL 10, 2009
.

TRANSCRIPT OF ARRAIGNMENT AND PLEA CONFERENCE
BEFORE HONORABLE A. KATHLEEN TOMLINSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The United States CHARLES PETER KELLY, ESQ.
United States Attorneys Office
824 Federal Plaza
Central Islip, NY 11722

For The Defendant: TINARI O'CONNELL OSBORN & KAUFMAN
By: PATRICK M. O'CONNELL, ESQ.
320 Carlton Avenue
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I N D E X

PAGE

ARRAIGNMENT

4

WITNESS

COURT

FERNANDO PABON

10

Colloquy

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1 THE CLERK: For arraignment and guilty plea, United
2 States of America against Fernando Pabon under criminal Docket
3 09-175. Counsel appearances.

4 MR. KELLY: For the government, Assistant U.S.
5 Charles P. Kelly and with Special Agent from the IRS Edward
6 Meehan. Good afternoon Your Honor.

7 MR. O'CONNELL: Good afternoon Your Honor Patrick L.
8 O'Connell, Tinari, O'Connell, Osborn and Kaufman, 320 Carlton
9 Avenue, Central Islip for Fernando Pabon who is seated next to
10 me with the interpreter Mya Grey.

11 THE COURT: All right. We've already sworn in Ms.
12 Grey as interpreter and that obviously remains in effect for
13 this proceeding.

14 I have before me a waiver of indictment that was
15 signed by Mr. Pabon and also by Mr. O'Connell as his counsel.
16 The record will so reflect that.

17 I have an order of referral from Judge Feuerstein
18 stating that the defendant has consented to have his plea taken
19 before me and I'm directed to administer the allocution here
20 and make a finding as to whether the plea is knowingly and
21 voluntarily made and not coerced. And a recommendation as to
22 whether the plea of guilty should be accepted.

23 That consent form also appears to have been executed
24 by the defendant, Fernando Pabon and his counsel Mr. O'Connell.
25 And I want to confirm for the record verbally from Mr. Pabon

Colloquy

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1 that he is agreeing to having his plea entered before me.

2 INTERPRETER MYA GREY PREVIOUSLY SWORN

3 MR. PABON: I accept.

4 THE COURT: All right. Before we proceed further, I
5 do want to inquire into the issue of Mr. Fernando Pabon's
6 representation here.

7 Mr. Pabon you, I believe, sat through the proceedings
8 immediately prior to this one in which we went through the
9 arraignment of your brother Juan Carlos and also the entering
10 of his plea, correct?

11 MR. F. PABON: Yes.

12 THE COURT: All right. And you heard what went on
13 during the course of those proceedings, correct?

14 MR. F. PABON: Yes.

15 THE COURT: And did you understand what you heard?

16 MR. F. PABON: Yes.

17 THE COURT: Now, Mr. Pabon you are being represented
18 here today by Mr. O'Connell. And the Court needs to insure
19 that you understand you have a right to your own independent
20 counsel separate and apart from counsel who may be representing
21 your brothers in this matter. Do you understand that?

22 MR. F. PABON: Yes.

23 THE COURT: And so you have the right to have someone
24 of your own choosing other than Mr. O'Connell represent you
25 here if you chose to do so. Do you understand that?

1 MR. F. PABON: Yes.

2 THE COURT: And that one of the concerns the Court
3 has on your behalf is this issue of a conflict of interest
4 that's potentially created by virtue of the fact that each of
5 your brothers and you are being represented by the same
6 attorney. Do you understand that?

7 MR. F. PABON: Yes.

8 THE COURT: Which is why we're attempting to insure
9 that you understand you have the right to your own counsel.
10 You understand?

11 MR. F. PABON: Yes.

12 THE COURT: Having worked through this case to this
13 point and I know that you had prior counsel here before Mr.
14 O'Connell took over this case, is it your desire to waive any
15 conflict of interest here and to retain Mr. O'Connell as your
16 counsel?

17 MR. F. PABON: Yes.

18 THE COURT: All right. And are you agreeing to waive
19 any conflict of interest freely and voluntarily of your own
20 free will?

21 MR. F. PABON: Yes.

22 THE COURT: All right. Is there anything further you
23 wish to put on the record Mr. O'Connell?

24 DIRECT EXAMINATION BY MR. O'CONNELL:

25 Q Mr. Pabon, you were previously represented by Mr. Garguilo

Colloquy

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1 regarding this matter.

2 A Yes.

3 Q And he represented both you and your two brothers, Juan
4 Carlos and Eduardo?

5 A Yes.

6 Q And the three of you signed the plea agreements back in
7 December of 2008 regarding this matter?

8 A Yes.

9 Q And when Mr. Garguilo became a New York State Supreme
10 Court justice he referred you to me and you wanted me to
11 represent all three of you?

12 A Yes.

13 Q And we discussed this possible conflict of interest before
14 with yourself and in the presence of your brothers, correct?

15 A Yes.

16 Q And you still want me to represent you in this matter,
17 correct?

18 A Yes.

19 Q Thank you.

20 MR. O'CONNELL: Nothing other than that.

21 THE COURT: Mr. Kelly anything further?

22 MR. KELLY: No, Your Honor. Thank you.

23 THE COURT: All right. Although the issue of the
24 same attorney representing all codefendants; well, they're not
25 really codefendants because these are three separate matters

Colloquy

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1 although they certainly arise from the same set of
2 circumstances and charges.

3 Nonetheless, having questioned Fernando Pabon on the
4 record, I find that his agreement to waive any conflict here is
5 knowingly entered into and voluntarily consented to and we will
6 proceed from that basis.

7 Proceed first with the arraignment.

8 MR. O'CONNELL: I acknowledge receipt of the
9 information under Docket 09-CR-00157.

10 MR. KELLY: 175.

11 MR. O'CONNELL: Yes, 175. And I've discussed it and
12 reviewed it with my client who's authorized me to enter a
13 preliminary not guilty plea. We also waive a preliminary
14 hearing.

15 THE COURT: All right. The record will reflect that
16 Fernando Pabon is waiving his right to a preliminary hearing.

17 Fernando Pabon, the purpose of this proceeding is to
18 make sure you understand what crimes you're charged with, to
19 make sure you understand you have a right to be represented by
20 an attorney and to address the question of whether you should
21 be released on bail or held in jail.

22 You are not required to make any statement here. And
23 I must caution you that any statement that you do make except
24 to your attorney can be used against you. Do you understand
25 that?

Colloquy

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1 MR. F. PABON: Yes.

2 THE COURT: Mr. Fernando Pabon have you had an
3 opportunity to see the information and the three charges that
4 have been filed against you?

5 MR. PABON: Yes.

6 THE COURT: And have you reviewed that information
7 with your counsel, Mr. O'Connell?

8 MR. F. PABON: Yes.

9 THE COURT: Do you understand that you have been
10 charged with three counts in this information; the first count
11 specifically charging you with conspiracy to defraud the United
12 States and specifically by under reporting wages earned by
13 employees of the three restaurants involved here. And failing
14 to payroll taxes on those under reported wages. And that you
15 did this in an agreement with yourself and your two brothers by
16 paying the employees in cash in addition to, as part of their
17 salary.

18 And further causing false form 941s for the three
19 restaurants to be filed with the IRS, knowing that they failed
20 to disclose the untaxed wages. That's count number 1. Do you
21 understand that?

22 MR. F. PABON: Yes.

23 THE COURT: And in count number 2 you are charged
24 with filing a false and fraudulent income tax return for
25 calendar year 2006. The count is actually for tax evasion.

Colloquy

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1 And for you filing a return that provides a false
2 representation of your income for 2006 and a false statement
3 with regard to the amount of tax owing on your compensation for
4 that year. That's charge number 2. Do you understand that?

5 MR. F. PABON: Yes.

6 THE COURT: And charge number 3 indicates that
7 together with your brothers you knowingly and intentionally
8 hired illegal aliens to work for you here in the United States
9 knowingly full well that these aliens were not authorized to
10 work in the United States. Do you understand that that's count
11 3 against you?

12 MR. F. PABON: Yes.

13 THE COURT: All right. Mr. O'Connell you've stated
14 that you had a chance to review the complaint with Fernando
15 Pabon. Have you advised him of his constitutional right to
16 these proceedings?

17 MR. O'CONNELL: Yes, I have Your Honor.

18 THE COURT: All right. I'm going to defer the issue
19 of detention or bail until we conclude the taking of the plea.

20 Fernando Pabon before accepting your plea, there are
21 a number of questions that I must ask you to insure that it is
22 a valid plea. If you do not understand any of my questions
23 please say so and I will attempt to reword the question in a
24 manner that you can answer it. Do you understand that?

25 MR. F. PABON: Yes.

F. Pabon-Court

11

1 THE COURT: All right.

2 THE CLERK: Madam Clerk will you please swear in the
3 defendant.

4 DEFENDANT, FERNANDO PABON, SWORN

5 EXAMINATION BY THE COURT:

6 Q Fernando Pabon, do you understand that having now been
7 sworn your answers to my questions will be subject to the
8 penalties of perjury or of making a false statement if you do
9 not answer them truthfully?

10 A Yes.

11 Q What is your full name sir?

12 A Fernando Pabon.

13 Q And how old are you?

14 A 57.

15 Q What is the highest level of schooling or education you
16 have completed?

17 A University.

18 Q All right. Mr. Pabon are you presently or have you
19 recently been under the care of a physician or a psychiatrist?

20 A No.

21 Q In the past 24 hours have you taken any narcotic drugs,
22 medicine or pills or drunk any alcoholic beverage?

23 A No.

24 Q Have you been hospitalized ever or treated for narcotics
25 addiction?

F. Pabon-Court

12

1 A No.

2 Q Is your mind clear as you sit here this afternoon?

3 A Yes.

4 Q Do you understand what's going on here in these
5 proceedings today?

6 A Yes.

7 THE COURT: Mr. O'Connell have you discussed this
8 matter with Fernando Pabon?

9 MR. O'CONNELL: Yes, Your Honor.

10 THE COURT: And does he understand the rights that he
11 would be waiving by pleading guilty here?

12 MR. O'CONNELL: Yes, Your Honor.

13 THE COURT: To the best of your knowledge Mr.
14 O'Connell is Fernando Pabon capable of understanding the nature
15 of these proceedings?

16 MR. O'CONNELL: Yes, Your Honor.

17 THE COURT: And do you have any doubt as to Fernando
18 Pabon's competency to plead at this time?

19 MR. O'CONNELL: No, Your Honor.

20 BY THE COURT:

21 Q Mr. Pabon you have a right to plead not guilty. Do you
22 understand that?

23 A Yes.

24 Q If you plead not guilty, under the Constitution and laws
25 of the United States you are entitled to a speedy and public

F. Pabon-Court

13

1 trial by jury with the assistance of counsel on these charges.

2 Do you understand that?

3 A Yes.

4 Q At the trial you would be presumed to be innocent and the
5 government would have to overcome that presumption and prove
6 you guilty by competent evidence and beyond a reasonable doubt.
7 And you would not have to prove that you were innocent. And if
8 the government failed, the jury would have the duty to find you
9 not guilty. Do you understand that?

10 A Yes.

11 Q In the course of the trial, the witnesses for the
12 government have to come to Court and testify in your presence.
13 And your counsel has the right to cross examine those witnesses
14 for the government, to object to evidence offered by the
15 government and to offer evidence on your behalf. Do you
16 understand that?

17 A Yes.

18 Q At the trial while you would have the right to testify if
19 you chose to do so, you would not be required to testify.
20 Under the Constitution of the United States you cannot be
21 compelled to incriminate yourself. If you decided not to
22 testify the Court would instruct the jury that they could not
23 hold that against you. Do you understand that?

24 A Yes.

25 Q If you plead guilty and if I recommend to Judge Feuerstein

F. Pabon-Court

14

1 that she accept the plea, you will be giving up your
2 constitutional rights to a trial and the other rights that I've
3 just discussed with you. There will be no further trial of any
4 kind and no right to appeal or collaterally attack or at any
5 time question whether you are guilty or not.

6 A judgment of guilty will be entered on the basis of your
7 guilty plea, which judgment can never be challenged. However,
8 you have the right to appeal with respect to the taking of this
9 plea and the sentence. Do you understand that?

10 A Yes.

11 Q If you plead guilty, I will have to ask you questions
12 about what you did in order to satisfy myself that you are
13 guilty of the charges to which you seek to plead guilty. And
14 you will have to answer my questions and acknowledge your
15 guilt. Therefore you'll be giving up your right not to
16 incriminate yourself. Do you understand that?

17 A Yes.

18 Q Fernando Pabon, are you willing to give up your right to a
19 trial and the other rights that I've just discussed with you?

20 A Yes.

21 THE COURT: I've been handed up what we have marked
22 as Court Exhibit 1 which is the plea agreement, labeled the
23 plea agreement between the United States government and
24 Fernando Pabon.

25 Q Mr. Pabon you have seen this plea agreement, is that

F. Pabon-Court

15

1 correct?

2 A Yes.

3 Q And you've reviewed it and you understand it?

4 A Yes.

5 Q And on page 10 here I see your signature along with your
6 then counsel Mr. Garjulo, correct?

7 A Yes.

8 Q All right. And you recognize that this is the only
9 agreement that you have with the government with respect to
10 these proceedings, is that correct?

11 A Yes.

12 Q All right.

13 THE COURT: Mr. Kelly I'll ask you now if you would
14 please to list whether there is a waiver of appeal or waiver of
15 any other rights included in the plea agreement.

16 MR. KELLY: Yes, Your Honor, there is a waiver of a
17 right to appeal or otherwise challenge by 2255 petitioner any
18 other petition, the conviction or the sentence should Judge
19 Feuerstein impose a term of imprisonment of 41 months or below.

20 THE COURT: All right.

21 Q Mr. Pabon you have just heard the Prosecutor state the
22 waivers that are contained in this plea agreement. Did you
23 hear those?

24 A Yes.

25 Q And you understand them?

F. Pabon-Court

16

1 A Yes.

2 Q And specifically you understand that if Judge Feuerstein
3 sentences you to a term of imprisonment of 41 months or less,
4 you are giving up your right to appeal the sentence. Do you
5 understand that?

6 A Yes.

7 THE COURT: All right. Mr. Kelly if you would, I'll
8 ask you to fill in the elements of each of the crimes charged
9 here in the information.

10 MR. KELLY: Yes, Your Honor. There are three crimes
11 charged in the information. The first is a conspiracy count, a
12 conspiracy to defraud the United States. And the elements are
13 that there was an agreement. And here the government would
14 show there was an agreement between the defendant Fernando
15 Pabon and his brothers, Juan Carlos and Eduardo to operate the
16 Mi Tierrita restaurants in Hempstead, New York, Brentwood, New
17 York and Patoque, New York with a cash payroll and under report
18 the wages of the employees of the restaurants. And the purpose
19 of this was to evade the payment of payroll taxes.

20 And that is what the brothers did in operating these
21 restaurants and specifically in filing false form 941s,
22 Fernando Pabon and others did that for the Finitia Restaurant
23 Corporation in 2006 when they reported for the quarter, April
24 1st to June 30th, 2006, \$68,363 in wages when in fact they
25 knew, Fernando Pabon knew that the total wages that should have

F. Pabon-Court

17

1 been reported and had payroll taxes on them was \$211,854. So
2 there was an agreement to defraud the IRS and it was carried
3 out by under reporting wages.

4 Count 2 is an income tax evasion count, personal,
5 federal income tax. And in that Fernando Pabon for the year
6 2006 reported his income as approximately 41,000 when in fact
7 he knew that his income was approximately \$304,000. And he did
8 this on the form 1040 as a resident of Holtsville, New York and
9 filed that with the IRS in an attempt to evade income tax that
10 was due and owing.

11 Count 3, unlawful employment of aliens, defendant
12 Fernando Pabon with his brothers, Juan Carlos and Eduardo,
13 knowingly and intentionally hired those who were not authorized
14 to work here. The elements of that crime are that they did
15 that knowingly and that they engaged in a pattern and practice
16 of such hiring. Thank you Judge.

17 THE COURT: All right.

18 BY THE COURT:

19 Q Fernando Pabon you have just heard the elements of the
20 crimes with which you are charged recited by the Prosecutor,
21 Mr. Kelly. Do you understand those elements of each of those
22 counts?

23 A Yes.

24 Q And have you discussed with Mr. O'Connell the three
25 charges in the information to which you intend to plead guilty

1 here today?

2 A Yes.

3 Q Do you understand each of those three charges as they are
4 stated in the information?

5 A Yes.

6 Q With regard to these three charges, and in conjunction
7 with the plea agreement that you have entered into with the
8 government, I'm going to take each of these counts one at a
9 time and ask you some questions.

10 First of all, on the first count, the conspiracy with
11 regard to the false filing of, I should say the filing of the
12 false form 941s, are you aware that under the statute, the
13 maximum sentence that Judge Feuerstein may impose upon you is
14 five years of incarceration?

15 A Yes.

16 Q And do you also understand that the minimum term of
17 imprisonment under the statute for this first count is zero
18 years?

19 A Yes.

20 Q Do you also understand that Judge Feuerstein may impose a
21 maximum fine on this count of \$250,000 or two times the gross
22 gain or gross loss, whichever is greater, pursuant to the
23 statute?

24 A Yes.

25 Q And do you also realize that the Court may order

F. Pabon-Court

19

1 restitution if it so directs and according to your plea
2 agreement, you and the government agree that restitution with
3 respect to your tax liabilities may be ordered by the Court?

4 A Yes.

5 Q Do you also understand that some of the other penalties
6 you may be facing here are deportation or removal?

7 A Yes.

8 Q Do you understand as well that there is a \$100 special
9 assessment which you are required to pay?

10 A Yes.

11 Q And do you realize Mr. Pabon that if any jail time is
12 imposed here by Judge Feuerstein, a period of three years of
13 supervised release must also be imposed?

14 A Yes.

15 Q All right. With respect to count 2 which is the tax
16 evasion count in conjunction with the filing of your personal
17 tax returns for 2006, do you understand that under the statute
18 the maximum sentence of incarceration which Judge Feuerstein
19 may impose is five years?

20 A Yes.

21 Q And do you also understand that pursuant to the statute
22 the minimum period of incarceration would be zero years?

23 A Yes.

24 Q Do you further understand that the maximum fine for count
25 2 which Judge Feuerstein may impose pursuant to the statute

F. Pabon-Court

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1 here is \$100,000?

2 A Yes.

3 Q And do you also realize that the Court may order
4 restitution if it so directs and that pursuant to your plea
5 agreement, you and the government agree that restitution with
6 respect to your tax liability may be ordered by the Court?

7 A Yes.

8 Q And do you further understand that there is a \$100
9 mandatory special assessment which you are required to pay as
10 an administrative fee associated with this count?

11 A Yes.

12 Q And do you also understand that the, pursuant to the
13 statute, the costs of prosecution of this matter may also be
14 assessed against you?

15 A Yes.

16 Q And do you understand further Mr. Pabon that if any jail
17 time is imposed here by Judge Feuerstein that a period of three
18 years of supervised release must also be imposed?

19 A Yes.

20 Q And moving on to count 3 which is the count relating to
21 the unlawful employment of aliens who are not authorized to
22 work in the United States. Do you understand that pursuant to
23 the statute the maximum of sentence of incarceration which
24 Judge Feuerstein may impose is six months?

25 A Yes.

F. Pabon-Court

21

1 Q And do you also understand that pursuant to the statute
2 the minimum term of imprisonment on this count is zero years?

3 A Yes.

4 Q The maximum fine that Judge Feuerstein can impose here is
5 \$3,000 for each unauthorized alien for whom such a violation
6 occurs but you and the government are agreeing that the fine
7 shall be \$150,000 payable jointly and severally with the
8 codefendants, Eduardo Pabon and Fernando Pabon, do you
9 understand that?

10 A Yes.

11 Q And do you also realize that there is again a \$100 special
12 assessment associated as an administrative cost with this third
13 count that you are required to pay?

14 A Yes.

15 Q And do you also understand Mr. Pabon that if Judge
16 Feuerstein imposes jail time that a period of one year of
17 supervised release must also be imposed?

18 A Yes.

19 Q All right. Fernando Pabon have you discussed the
20 sentencing guidelines with Mr. O'Connell, your counsel?

21 A Yes.

22 Q Based on our recent Supreme Court decision, the guideline
23 sentencing range is not mandatory, it is advisory only. Do you
24 understand that?

25 A Yes.

F. Pabon-Court

22

1 Q In other words, Judge Feuerstein must consider the
2 sentencing guideline range but she is not compelled to sentence
3 you within that range. Do you understand that?

4 A Yes.

5 Q After considering the sentencing guideline range, Judge
6 Feuerstein must consider all the other factors in your case.
7 For example, she must consider the statutory reasons for
8 sentencing. Those include first of all the nature and
9 circumstances of the offense that you're charged with here, the
10 three of them, as well as the history and characteristics of
11 you as a defendant.

12 She must also consider the need for the sentence imposed
13 to reflect the seriousness of the offense, to promote respect
14 for the law and to provide just punishment for the offense.

15 Judge Feuerstein must also consider the need to afford
16 deterrence as to other criminal conduct. And the need to
17 protect the public from further crimes that you might commit.

18 Once she's taken into account all these factors including
19 the sentencing guideline range and all the other circumstances
20 that I've just discussed with you, Judge Feuerstein must then
21 determine a sentence that is reasonable in these circumstances.
22 Do you understand that?

23 A Yes.

24 Q Do you also understand that any estimate of the guideline
25 range provided by the government is not binding on the Court?

1 A Yes.

2 Q And Fernando Pabon do you realize that if the sentence
3 imposed by Judge Feuerstein is more severe than you expected,
4 you will nonetheless be bound by your guilty plea and you will
5 not be permitted to withdraw it?

6 A Yes.

7 Q Fernando Pabon, do you have any questions that you would
8 like to ask me about the charges or your rights or anything
9 else relating to this matter?

10 A No.

11 Q Fernando Pabon, are you ready to plead?

12 A Yes.

13 THE COURT: Mr. O'Connell do you know of any legal
14 reason why Fernando Pabon should not plead guilty?

15 MR. O'CONNELL: No, Your Honor.

16 Q Fernando Pabon are you satisfied with your legal
17 representation in this matter?

18 A Yes.

19 Q And Mr. Pabon what is your plea to count 1 of the
20 information?

21 A I'm guilty.

22 Q And what is your plea to count 2 of the information?

23 A I'm guilty.

24 Q And what is your plea to count 3 of the information?

25 A I'm guilty.

F. Pabon-Court

24

1 Q Fernando Pabon, are you making the plea of guilty here
2 voluntarily and of your own free will?

3 A Yes.

4 Q Has anyone threatened or forced you to plead guilty?

5 A No.

6 Q Other than the agreement with the government which is the
7 plea agreement that we've marked as Court Exhibit 1 and as has
8 been stated on the record, has anyone made any promises that
9 caused you to plead guilty?

10 A No.

11 Q Has anyone made any promise to you as to what your
12 sentence will be?

13 A No.

14 Q Fernando Pabon did you as charged in count 1 of the
15 information file a false and fraudulent or cause false and
16 fraudulent form 941s to be filed for the three restaurants at
17 issue here and file them with the Internal Revenue Service
18 knowing that they were false and fraudulent because they failed
19 to disclose untaxed wages?

20 A Yes.

21 Q And as to count 2 with respect to your individual tax
22 return for the calendar year of 2006, did you file a false and
23 fraudulent tax return attempting to evade your tax
24 responsibilities by understating your income as well as the tax
25 owed on that income?

F. Pabon-Court

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1 A Yes.

2 Q And with respect to count 3 did you knowingly and
3 willingly along with your brothers hire illegal aliens to work
4 at the restaurants knowing full well that these individuals
5 were not authorized to work in the United States?

6 A Yes.

7 Q Fernando Pabon I will ask you now please to describe in
8 your own words what you did in connection with the acts charged
9 in counts 1, 2 and 3 of the information.

10 A About July 31, 2006 I Fernando Pabon and Eduardo Pabon and
11 Juan Carlos Pabon caused to be filed of a false form 941 for
12 FRC which reported that between April 1, 2006 and June 30, 2006
13 for \$68,363 in wages were paid to Finitia Restaurant
14 Corporation that were subject to payroll taxes when in fact as
15 I didn't under believe the total wage earning by FRC employees
16 that were subject to payroll taxes during the time period was
17 \$211,854.

18 Q And when you conspired with your brothers to perform these
19 acts, did you know at that time that you were violating the
20 laws of the United States?

21 A Yes.

22 THE COURT: Mr. Kelly is there anything else?

23 MR. KELLY: And this was in connection with the Mi
24 Tierrita Restaurants that you and your brothers operated in
25 Nassau and Suffolk Counties, correct?

F. Pabon-Court

26

1 MR. F. PABON: Yes.

2 MR. KELLY: And to operate these restaurants you used
3 in part a cash payroll to evade payroll taxes, correct?

4 MR. F. PABON: Yes.

5 MR. KELLY: Thank you Judge.

6 THE COURT: All right. Let's move on to count 2.

7 BY THE COURT:

8 A For the tax year 2006 I knowingly declared income of
9 \$41,682 and paid federal income tax of \$5,496 when I knew the
10 proper income amount was \$304,343 and the proper federal income
11 tax amount was \$80,415. I received cash income and failed to
12 declare it in order to evade taxation.

13 Q All right. And where were you living at the time that you
14 filed this false tax return?

15 A Holtsville.

16 Q All right. And at the time that you completed and filed
17 this false tax return you understood at that time, did you not,
18 that you were violating the laws of the United States?

19 A Yes.

20 Q All right.

21 THE COURT: Anything else Mr. Kelly?

22 MR. KELLY: No, Your Honor, thank you.

23 THE COURT: All right, let's move on to count 3.

24 A From 2003 to 2008 in Nassau and Suffolk County I knowingly
25 employed individuals at the Mi Tierrita Restaurant that were

F. Pabon-Court

27

1 not authorized to work in the United States. And I worked to
2 get some of them their working papers. I knew they were not
3 authorized to work in the United States.

4 Q All right. And you did this hiring knowingly and
5 intentionally along with your two brothers, is that correct?

6 A Yes.

7 Q And these individuals you hired were to work in the
8 restaurants that were located in Nassau and Suffolk Counties,
9 correct?

10 A Yes.

11 Q And at the time you hired these individuals you knew that
12 they were not authorized to work in the United States, correct?

13 A Yes.

14 Q And so you also knew at that point that you were violating
15 the laws of the United States when you did so, is that correct?

16 A Yes.

17 Q All right.

18 THE COURT: Anything further Mr. Kelly?

19 MR. KELLY: These hirings were part of a pattern and
20 practice that you carried out together with your brothers at
21 the Mi Tierrita restaurants, correct?

22 MR. F. PABON: Yes.

23 MR. KELLY: Nothing further. Thank you Judge.

24 THE COURT: All right. Mr. Kelly if you would
25 please, I'm going to ask you to outline the government's proof

1 of this were it to go to trial.

2 MR. KELLY: Using the, on count 1, the payroll tax
3 evasion, we would use the actual filings that were made and
4 signed by the defendant, Fernando Pabon or one Carlos Pabon or
5 Eduardo Pabon. We would provide documents to show the cash
6 receipts of the business and we would show the cash payroll of
7 the business. And show the contrast between the actual cash
8 payroll of the Mi Tierrita Restaurants and what was reported to
9 the IRS on the form 941s. And we would show this through the
10 documents that we've obtained in this case as well as the
11 filings with the IRS.

12 As for the income tax evasion we would use as
13 evidence the federal income tax return filed by the defendant
14 Fernando Pabon and we would use the cash receipts records of
15 the business and the testimony of individuals to demonstrate
16 that he had received not in 2006, 41,000 approximately as he
17 reported, but in excess of \$300,000 income. And that his
18 federal income tax amount was not approximately 5,000 as he
19 said on his income tax return, but over \$80,000.

20 As for count 3, unlawful employment of aliens, we
21 would show that a significant number of the employees of the Mi
22 Tierrita restaurants had, were not authorized to work in the
23 United States. They had no status in the United States. They
24 utilized false social security numbers. And the defendants,
25 defendant Fernando Pabon together with his brothers Juan Carlos

1 and Eduardo Pabon for the employees who had worked there for a
2 while and were doing good work, would actually seek status and
3 working papers for them which the government used as further
4 evidence of their knowledge that these individuals were not
5 authorized to work in the United States.

6 And we would show those by the records of employee
7 and records of the cash payroll and the immigration
8 authorizations that were sought after some employees, for some
9 employees after they had worked there for a significant period
10 of time and were doing well.

11 So it would be a combination of documents and live
12 testimony that the government would use to prove each of the
13 three counts against Mr. Fernando Pabon.

14 THE COURT: Thank you. I had noted earlier in this
15 proceeding that I had a waiver of indictment form filled out by
16 the defendant and his counsel.

17 I neglected to state that I have also executed that
18 document and that also now becomes part of the record here.

19 Based upon all the information that's been presented
20 to me here, I find that the defendant Fernando Pabon is acting
21 voluntarily. That he fully understands his rights and the
22 consequences of his plea. And that there is indeed a factual
23 basis for the plea.

24 I am therefore recommending to Judge Feuerstein that
25 she accept the plea of guilty to counts 1, 2 and 3 of the

1 information.

2 Now, what is the government's position with respect
3 to the issue of bail for Fernando Pabon?

4 MR. KELLY: The government had recommended that the
5 Court approve a secured bond of \$200,000 secured by both Mr.
6 Pabons' marital residence and the surety had been signed, has
7 been signed by his wife who's a co-owner of the home. In
8 addition, the government had the property at 205 McCormick
9 Drive, Bohemia, New York put up as security for the \$200,000
10 bond because that is owned partially by Mr. Fernando Pabon. I
11 believe it's about 15 percent is owned by Fernando Pabon. The
12 rest is owned by Juan Carlos Pabon and Eduardo Pabon who have
13 also signed the \$200,000 bond for Fernando Pabon so that that
14 property in its entirety also secures the bail of Mr. Fernando
15 Pabon.

16 And together with the conditions that are indicated
17 on the bail sheet that has been signed by the defendant
18 Fernando Pabon, his spouse as well as Juan Carlos and Eduardo
19 Pabon, the government recommends that that bail which I believe
20 has been consented to by defendant, be sufficient for Fernando
21 Pabon who has less assets and less of an interest in the, less
22 of a financial interest in the restaurants.

23 THE COURT: All right. Mr. O'Connell you want to be
24 heard.

25 MR. O'CONNELL: I would join in the government's

Colloquy

31

1 application. I've reviewed it with my client, his wife and his
2 brothers and they've agreed to that subject to your approval
3 and signed the document.

4 THE COURT: All right. It appears to me from my
5 review of the pretrial services report that Fernando Pabon's
6 income is considerably less on a yearly basis than the other
7 two brothers.

8 Let's see -- Miriam Pabon, is she here? Would you
9 step up ma'am.

10 MR. O'CONNELL: Can she sit here and the interpreter
11 can interpret for both?

12 THE COURT: Yes. Mrs. Pabon, I believe you've been
13 sitting here for most of the proceedings today including those
14 involving Juan Carlos Pabon, is that correct?

15 MRS. PABON: Yes.

16 THE COURT: And you have been asked to serve as a
17 suretor here on the bond to secure the release of your husband
18 on bail until such time as these charges are disposed of, is
19 that correct?

20 MRS. PABON: Yes.

21 THE COURT: It appears to me from the bond document
22 that you are cosigning here as an owner of the residence at 114
23 Seventh Avenue in Holtsville, correct?

24 MRS. PABON: Yes.

25 THE COURT: And just a couple of questions that I

Colloquy

32

1 need to ask you. First of all, this is a very serious matter
2 which I'm sure you fully understand at this point.

3 MRS. PABON: Yes, I do.

4 THE COURT: And that there is a risk involved here
5 directly to you in your capacity as a suretor for this bond.
6 And specifically, the purpose of this bond is to insure that
7 Fernando Pabon comes back to Court each and every time he's
8 directed to do so by the Court until such time as this matter
9 is fully disposed of. Do you understand that?

10 MRS. PABON: Yes.

11 THE COURT: And if for any reason Mr. Pabon did not
12 return on an assigned date from the Court, then the government
13 would have the right to foreclose on this bond and to come
14 after you personally for the amount of money that the bond is
15 issued in and here it's \$200,000. So you are literally at risk
16 for that amount of money. Do you understand that?

17 MRS. PABON: Yes.

18 THE COURT: And the government would have the right to
19 take whatever action was necessary to obtain the \$200,000 or
20 its equivalent if for any reason your husband did not return to
21 Court as directed. And that means for example -- are you
22 employed now?

23 MRS. PABON: No.

24 THE COURT: Okay. Well, the government has a right to
25 bring a suit against you for example to collect that money even

Colloquy

33

1 if you're not working if you have any other assets. And I need
2 to know that you understand that the government does have that
3 right and that you are at risk for that sum of money. Do you
4 understand that?

5 MRS. PABON: Yes.

6 THE COURT: And knowing what the risk is here, are you
7 nonetheless agreeing to sign on to this bond as a suretor to
8 make sure that Mr. Pabon comes back here for each and every one
9 of his court appearances?

10 MRS. PABON: Yes.

11 THE COURT: And is this your signature on the bond?

12 MRS. PABON: Yes, that's my sign.

13 THE COURT: Okay, thank you Mrs. Pabon. You can step
14 back now.

15 MRS. PABON: May I ask a question?

16 THE COURT: Yes.

17 MRS. PABON: What would happen if my husband should
18 get sick and cannot appear?

19 THE COURT: Well, certainly if that were to be the
20 case, Mr. O'Connell as his counsel would bring that to the
21 Court's attention and to the government's attention. And if he
22 is truly ill, obviously his appearance for that particular day
23 might be excused. But he might be asked to provide some
24 medical documentation to confirm that.

25 MRS. PABON: Okay, thank you.

Colloquy

34

1 THE COURT: But I'm sure that Mr. O'Connell will
2 handle that.

3 MRS. PABON: Okay, thank you so much.

4 THE COURT: All right. Thank you ma'am. I know that
5 Eduardo Pabon and Juan Carlos Pabon are in the courtroom. I
6 just want them to stand for a moment. You understand I have
7 explained these conditions on two occasions now. I know you
8 both heard them.

9 But since you are signing on to these bonds are
10 suretors, I want you to acknowledge that you understand the
11 risk that's being undertaken here and also what your
12 responsibility is should for any reason Fernando Pabon not
13 return to Court when he's supposed to. You can be held liable
14 for those, for the full amount of the bond? Do you understand
15 that?

16 Let me ask, confirm, Juan Carlos Pabon, do you
17 understand that? And you're undertaking the risk regardless of
18 that fact?

19 MR. J.C. PABON: (No audible response).

20 THE COURT: And Eduardo Pabon, you understand what
21 the risk is?

22 MR. E. PABON: (No audible response).

23 THE COURT: And are you willing to undertake that
24 risk, understanding all of the things that I've just outlined
25 to Miriam Pabon?

Colloquy

35

1 MR. E. PABON: (No audible response).

2 THE COURT: All right. The record will reflect that
3 both gentlemen have verbally agreed yes, they do understand the
4 risk. And they nonetheless are willing to undertake such risk.

5 All right, I'm going to go ahead and sign the bond.

6 Fernando Pabon you are being released on a secured
7 appearance bond. The bond is being secured by the property
8 which is your residence in addition to property listed at 167
9 Sixth Avenue in Holtsville and at 31 Summerfield Drive in
10 Holtsville, at 205 McCormick Drive in Bohemia. And I think
11 that's all of the properties, correct?

12 MR. KELLY: Yes.

13 MR. O'CONNELL: Yes, Your Honor.

14 THE COURT: All right. Fernando Pabon I'm also
15 directing that you must remain in and you may not leave the
16 eastern and southern district of New York and Connecticut.
17 Just so I understand, Connecticut as added here because?

18 MR. KELLY: Because the defendant's daughter is
19 expected to give birth in the near future and she lives in
20 Connecticut so that he could go up there.

21 THE COURT: All right. Very well then. So you
22 understand Mr. Pabon that your travels are limited to the
23 eastern and southern districts of New York as well as the State
24 of Connecticut. Do you understand?

25 MR. F. PABON: Yes.

Colloquy

36

1 THE COURT: You may not travel outside that area
2 without the prior permission of the Court. Do you understand
3 that?

4 MR. F. PABON: Yes.

5 THE COURT: In addition, I am directing you to
6 surrender any and all passports that you have to the pretrial
7 services agency no later than April 24th. And I am directing
8 you not to apply for any further passports. Do you understand
9 that?

10 MR. F. PABON: Yes.

11 THE COURT: I'm also placing you under the express
12 supervision of the pretrial services agency. You are to
13 report to that agency once per month in person and once per
14 week by telephone. Do you understand that?

15 MR. F. PABON: Yes.

16 THE COURT: And I have outlined to you now all of the
17 conditions of your release. Do you agree to abide by those
18 conditions?

19 MR. F. PABON: Yes.

20 THE COURT: All right. As I've indicated, I've now
21 signed the bond and the conditions of release. Is there
22 anything further from the government?

23 MR. KELLY: No, Your Honor, thank you.

24 THE COURT: Anything further from the defendant Mr.
25 O'Connell?

1 MR. O'CONNELL: No, Your Honor.

2 THE COURT: All right. Then this matter is
3 concluded.

4 * * *

5 CERTIFICATION

6 I, TRACY GRIBBEN, a Certified Electronic Transcriber
7 do hereby certify that the foregoing transcript of proceedings
8 is a true and accurate transcript of the telephonic motion as
9 recorded in the matter of United States of America versus
10 Fernando Pabon, heard by the U.S. District Court on April 10,
11 2009 1:19 p.m. to 2:16 p.m.

12

13 _____ Date: _____

14 TRACY GRIBBEN

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16 TERRY GRIBBEN'S TRANSCRIPTION SERVICE

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